91-1830

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILLIE J. UPCHURCH and CHERYL A. JORDAN BALL,
Petitioners,

vs.

CONNIE McCOY CLARK,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION OF BILLIE J. UPCHURCH AND CHERYL A. JORDAN BALL FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in October 1989, nurses employed by a municipal hospital had a clearly established duty to intervene in appropriate medical treatment of a non-consenting patient in a hospital emergency room.

PARTIES TO THE PROCEEDING

The parties to this appellate proceeding are defendants/petitioners Billie J. Upchurch and Cheryl A. Jordan Ball, and the plaintiff/respondent Connie McCoy Clark. There are additional parties defendant not participating in this appeal.

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No.

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PETITION OF BILLIE J. UPCHURCH AND CHERYL A. JORDAN BALL FOR WRIT OF CERTIORARI

Petitioners, Billie J. Upchurch and Cheryl A. Jordan Ball, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the court of appeals, Appendix A, was filed February 13, 1992. The unreported district court memorandum and order, Appendix B, was filed May 21, 1991.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE AND OF THE FACTS

This § 1983 complaint against the present petitioners and several other defendants arises out of an incident on the night and early morning of October 11-12, 1989, when plaintiff, in police custody, was brought to the emergency room of Nashville's public municipal hospital. She complains that she received medical treatment there without her consent — primarily a blood analysis and a urinalysis. There is no allegation that the medical treatment was anything other than fully competent and appropriate, except for the consent issue.

The complaint was filed October 9, 1990. On December 14, 1990, these petitioners filed a Motion to Dismiss, or in the alternative for summary judgment, pursuant to F.R.C.P. 12(b)(6), relying inter alia on the qualified immunity defense. The plaintiff

filed a response to said motion on December 27, 1990; and a supplemental memorandum in opposition on January 3, 1991. Appellants filed a supplemental memorandum of law in support of their motion on January 28, 1991. On the same date, the appellants filed a motion to strike certain portions of an affidavit filed by the plaintiff on December 27, 1990. Plaintiff filed a reply to the supplemental memorandum on February 7, 1991, and a response to the motion to strike on February 6, 1991.

The District Court entered a memorandum and an order ruling on appellants' Rule 12 motion, and on certain other issues not pertinent to this appeal, on May 21, 1991.

On June 5, 1991, these appellants filed a Notice of Appeal as to the denial of their Rule 12 motion on the issue of qualified immunity.

In an unreported opinion filed February 13, 1992, the Sixth Circuit upheld the ruling of the District Court.

For purposes of this appeal, the facts as recited in the Complaint must be taken as true. *Arrasmith v. Pennsylvania Railroad Company*, 410 F.2d 1311, 1313 (6th Cir. 1969). The Complaint's allegations, insofar as they pertain to these petitioners (and indeed all of the defendants), are graphic and sensationalistic. However, as discussed more fully at pages 10 through 14 infra, and contrary to the analysis of the Sixth Circuit, the only area in which a constitutionally-cognizable section 1983 claim is made out as against these petitioners is in an alleged failure to intervene in the nonconsensual catheterization of the plaintiff. (For purposes of this appeal, it is assumed that plaintiff was competent to withhold consent to the procedure.)

While reviewing the allegations of the Complaint, it should be kept in mind that the plaintiff was being treated for medical reasons. This is not a case like *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1526, 16 L.Ed.2d 908 (1966) where a blood sample

was withdrawn for evidentiary purposes by a physician acting under the direction of a police officer, not pursuant to his own independent medical judgment. It also is important to remember that except for some truly de minimis actions by petitioner Upchurch, neither of these petitioners engaged in medical treatment of the plaintiff at all, consensual or otherwise.

What follows is the District Court's summary, essentially a verbatim excerpt from the Complaint, at pages 3 and 4 of its Memorandum. Appendix B, pages A-8 to A-10. Although it is not directly relevant to this appeal, these petitioners wish to state to this Court that virtually all of the Complaint's factual allegations with respect to their involvement in this incident will be vigorously contested should the case proceed to trial against them.

G. Unconstitutional warrantless seizure of blood from Mrs. Clark:

* * *

53) Upon her arrival at General Hospital Mrs. Clark encountered the Defendant Upchurch, who was working as a triage nurse. The Defendant wiped the Plaintiff's face with a rag and violently jerked the Plaintiff's head. The Defendant Upchurch stepped on the Plaintiff's feet and kicked her.

54) Mrs. Clark attempted to resist the battery committed by the Defendant Upchurch. . . .

55) The Defendant Upchurch measured Mrs. Clark's pulse and blood pressure, even though Mrs. Clark had refused consent for any medical treatment. The Defendants Upchurch and Hyde [a Metropolitan police officer] forcibly placed Mrs. Clark on a gurney with her arms handcuffed behind her in such manner as to exert undue stress upon her broken collar bone.

56) The Defendants Upchurch and Hyde refused Mrs. Clark's repeated requests to be allowed to use the toilet facilities. Mrs. Clark again involuntarily urinated while handcuffed to the gurney.

57) The Defendant John Doe, against the express wishes of Mrs. Clark, took a needle and extracted blood from Mrs. Clark's arm. Neither the Defendant John Doe nor anyone else at any time displayed any warrant for the collection of bodily fluids.

* * *

1. Warrantless forcible catheterization of Mrs. Clark:

63) Following the above-described questioning of Mrs. Clark by the Defendant Hyde, the Defendant Jordan [Ball] came in and told Mrs. Clark that she was stupid and that she was going to get exactly what she deserved for not telling them what had happened.

64) The Defendant Jordan then asked Mrs. Clark if she had been catheterized for a drug screen. Mrs. Clark offered to give a urine specimen; however, the Defendant Jordan attempted to force Mrs. Clark's legs apart and to remove her pants.

65) Mrs. Clark vehemently objected to being catheterized. She raised both feet and kicked the Defendant Jordan across the room.

66) The Defendant Jordan then summoned the Defendants Hyde, James Doe and Jonathan Doe. The Defendants James Doe and Jonathan Doe handcuffed Mrs. Clark's right arm to the gurney and held Mrs. Clark down by her sides, and the Defendant Hyde placed his forearm across her throat, restricting her breathing, and across her injured collar bone.

67) The Defendant Upchurch and the Defendant Jane Doe then entered the room. The Defendants James Doe and Jonathan Doe held Mrs. Clark's legs apart. The Defendant Jane Doe lowered Mrs. Clark's pants and undergarments and forcibly catheterized her while Mrs. Clark screamed her objections.

68) During the time of the forcible catheterization of Mrs. Clark by the Defendant Jane Doe, the Defendants Jordan, Upchurch, Hyde, James Doe and Jonathan Doe were all present. No Defendant took any action to prevent this violation of Mrs. Clark's person.

69) After the catheterization was completed, the Defendants refused to pull Mrs. Clark's pants and undergarments back up. The Defendants instead left her lying with her buttocks, pubic area, genitalia and anus exposed within full view of a hospital corridor. Mrs. Clark remained in this humiliating condition until the Defendant Hyde went off duty and was relieved by another police officer.

* * *

3. Harm suffered by Mrs. Clark as a result of Defendants' actions:

* * *

75) The Plaintiff avers that the actions and omissions of the Defendants Hyde, Jordan, Upchurch, Jane Doe, James Doe and Jonathan Doe constitute an actionable deprivation of her Fourteenth Amendment liberty interest in the right to refuse medical treatment.

76) The Plaintiff avers that the actions and omissions of the Defendant[s] have violated her right to be free of unreasonable searches and seizures in contravention of rights secured to the Plaintiff by the Fourth and Fourteenth Amendments.

77) The Plaintiff avers that the actions and omissions of the Defendants have deprived her of her Fourteenth Amendment liberty interest in freedom from unduly harsh treatment while in custody as a pretrial detainee.

78) The Plaintiff avers that the conduct of the Defendants set forth hereinabove demonstrates such callous and reckless disregard for her constitutional rights as to make appropriate an award of punitive or exemplary damages.

District Court's Memorandum filed May 21, 1991, pp. 3-4, Appendix B, pages A-8 to A-10.

In addition, the District Court noted evidence placed in the record by these petitioners to the effect that:

(A) Plaintiff's treatment during the incident was under the supervision of a physician, incident to plaintiff's evaluation and treatment following a motor vehicle accident; and

(B) Plaintiff's blood alcohol level at the time of the treatment was .213. (*Id.* at pp. 10-12; App. A-16 to A-19).

Plaintiff has not contested these additional facts.

The record also shows that plaintiff presented to the hospital's emergency room in custody of a police officer who advised petitioner Upchurch that plaintiff had been involved in a hit-and-run accident; had "attempted to run over some people"; and had been apprehended later "in a room, and will not talk or answer any questions". Emergency Room Record, October 11, 1989, Exhibit B to Defendants' Motion to Dismiss, filed December 14, 1990, p. 8. (Appendix D, page A-51). The emergency room physician's notes recite that plaintiff was the driver in a hit-and-run incident who was "traced by police and found in an unresponsive condition". *Id.* The affidavit of this physician further characterizes the plaintiff as "combative and noncooperative", and establishes that the procedures performed (a blood test and

a urinalysis) were necessary to rule out possible injuries resulting from the motor vehicle accident. Exhibit A to Defendants' Memorandum, supra, filed December 14, 1990. Appendix E, page A-53. Neither of these petitioners is alleged to have performed either the blood sampling procedure or the catheterization for the urinalysis. Neither of these petitioners is alleged to have failed to intervene in the blood sampling procedure. Although the Sixth Circuit's opinion seems to suggest that petitioner Upchurch failed to intervene in the blood sampling procedure, this allegation is actually not made against either Upchurch or Ball. See Complaint, p. 13, ¶ 58. (Appendix C, page A-44).

The graphic and sensationalistic character of some of the claims against these petitioners cannot elevate them from essentially state tort claims to the level of constitutional deprivations. As discussed more fully below at pages 10 to 14 even under the Sixth Circuit's analysis, this Complaint, as to these petitioners, is about the failure to intervene in appropriate medical care in a hospital emergency room of an intoxicated patient who (they were advised) was the driver in a hit-and-run motor vehicle accident.

REASONS FOR GRANTING THE PETITION

Rule 10.1 of this Court reads as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

In this case, certiorari is appropriate under Rule 10.1.(c). In dismissing the Rule 12 motion of these petitioners, the Sixth Circuit has issued a ruling in conflict with applicable decisions of this Court — most notably *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

(a) Under *Anderson*, and under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), government officials are shielded from civil rights liability for damages, so long as their actions could reasonably have been thought to be permissible in light of legal rules that were clearly established at the time the action was taken.

The relevant issue is whether a reasonable officer could have believed the action to be lawful in light of clearly established law and the information possessed at the time. The officer's subjective beliefs about the action are irrelevant. *Anderson v. Creighton*, 483 U.S. at 641, 107 S.Ct. at 3040, 97 L.Ed.2d at 532. If the law is not clearly established at the time of the incident, judgment in favor of the defendant official is appropriate. *Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410. To be "clearly established", in the Sixth Circuit at least, a question must be decided either by the highest state court in the state where the case arose, by a U.S. Court of Appeals, or by the U.S. Supreme Court. *Robinson v. Bibb*, 840 F.2d 349 (6th Cir. 1988).

The test to be applied is fact-specific.

> The operation of this standard . . . depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touch-stone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of

> virtually unqualified liability simply by alleging violation of extremely abstract rights . . .

Anderson v. Creighton, 483 U.S. at 639, 107 S.Ct. at 3038-39, 97 L.Ed.2d at 530 (1987). To pass the test articulated in *Anderson*, the right alleged to have been violated must have been clearly established in a particularized and relevant sense. *Id.* at 640, 107 S.Ct. at 3038, 97 L.Ed.2d at 531.

No such particularized and relevant, fact-specific precedent has been cited by the Sixth Circuit, the District Court, or the plaintiff.

The Sixth Circuit's substantive discussion of the issue is confined to two paragraphs at page 4 of the opinion, which read in their entirety as follows:

> Although defendants have attempted to characterize this case as involving only a "duty to intervene," we believe plaintiff has properly alleged a violation of the *substantive due process right of pretrial detainees to be free from serious bodily intrusions, the procedural due process right to refuse or challenge unwanted medical treatment, the right to be free from warrantless extractions of bodily fluids conducted in an unreasonable manner, and the "right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary. . . ." Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987).
>
> In a thorough opinion applying qualified immunity principles, the district judge ruled that " 'the contours of the rights' involved in this case are sufficiently clear such that reasonable state officials would understand when their actions violate these rights." *Clark v. Hyde*, No. 3:90-0880, slip op. at 19 (M.D. Tenn. May 21, 1991) (quoting *Anderson*, 483 U.S. at 640).

Appendix A, pages A-4 to A-5. (Emphasis supplied.)

It is respectfully submitted that the Sixth Circuit's skepticism here is misplaced. The District Court and the plaintiff, as well as these petitioners, have characterized this as a duty-to-intervene case. More important, contrary to the Sixth Circuit's analysis, the plaintiff has not alleged *against these petitioners*: (1) any serious bodily intrusion; (2) any actual medical treatment [except for a blood pressure and pulse rate reading by petitioner Upchurch]; (3) any extraction of bodily fluids [other defendants are alleged to be responsible for these actions]; or (4) any forced exposure to strangers of the opposite sex.

Simple review of the Complaint (Appendix C) shows that there is no allegation as to these petitioners respecting (1) serious bodily intrusions or (2) extraction of bodily fluids.

The only actual medical treatment alleged was on the part of nurse Upchurch, who is alleged to have obtained the patient's blood pressure and taken a pulse reading without consent. Assuming this to be true, it states, at most, a truly de minimis state tort claim, which clearly does not rise to the level of an "affirmative abuse of power", *Daniels v. Williams*, 474 U.S. 327 at 330, 106 S. Ct. 662 at 664, 88 L.Ed.2d 662 at 667 (1986). Nurse Ball is alleged only to have attempted, unsuccessfully, to catheterize the plaintiff, abandoning the attempt when plaintiff kicked her across the room.

And, assuming without conceding that plaintiff was left unclothed by any defendant, the Complaint, fairly read, alleges that this was incident to the catheterization of the plaintiff to obtain a urine sample. Reclothing the patient would therefore have been just as much an intervention in her medical care as interference with the cathererization itself, requiring a determination that the catheterization process had been completed; and/or that no follow-up process was needed; and/or that any such process would not be compromised by reclothing the patient; and/or that the patient could safely be relocated to another area

of the emergency room, which might be more private. This allegation thus adds nothing to the issue of whether a duty was clearly established requiring these petitioners to intervene in appropriate medical treatment of the plaintiff. Seen in context, it merely restates that basic issue.

Kent v. Johnson, 821 F.2d 1220 (6th Cir. 1987), cited by the appellate court, is completely inapposite, involving a male prison inmate's complaint about the unrestricted access of female prison guards to his toilet and shower facilities, and having nothing whatsoever to do with medical treatment, hospitals or emergency rooms. Thus, even under the Sixth Circuit's own analysis, the case reduces ultimately to one involving an alleged duty to intervene.

In upholding the reasoning at page 19 (Appendix B, page A-26), of the District Court's opinion, the Sixth Circuit has, by necessary implication, endorsed the District Court's reasoning at pages 16-17 (pages A-22 to A-24 of the Appendix), where it is asserted that a special relationship existed between this plaintiff and these petitioners, such that a clearly-established duty to intervene in her emergency room medical care existed at the time of the incident. For this proposition, the District Court, and presumably the Sixth Circuit, place principal reliance upon *Tucker v. Callahan*, 867 F.2d 909 (6th Cir. 1989). That decision — decided just eight months before the incident at issue here — did not involve health care workers in an emergency room, but alleged failure to intervene by an on-duty police officer who witnessed an assault being made upon a citizen. Moreover, the holding in *Tucker* was that the requisite "special relationship" did *not* exist. It is most difficult to see how a finding in February 1989 that a special relationship does not exist between an on-duty police officer and a mugging victim in a parking lot, can clearly establish that, in October 1989, such a relationship did exist between nurses in an emergency room and a patient receiving medical treatment there, consensual or otherwise.

In discussing what constitutes a special relationship for purposes of qualified immunity analysis, *Tucker* relied upon several cases from the Seventh Circuit, and especially upon *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985) cert. denied 475 U.S. 1047. In *Ellsworth* (as in *Tucker*), no special relationship was found to exist between plaintiff and police department personnel. The Seventh Circuit expressly stated that:

> (t)he contours of what constitutes a "special relationship" between a municipality, acting through its officials, and its citizens are hazy and indistinct.

774 F.2d at 185.

Neither the Sixth Circuit, the District Court, nor the plaintiff has cited any cases dealing with health care workers which support the contention that a duty existed on the part of the nurses to intervene in October of 1989 in emergency room treatment. The only remotely close analogy put forward has been *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974). That case involved a failure to intervene in the beating death of a state hospital inmate. This is plainly not comparable to a failure to intervene in emergency room medical care. Given the basically "hazy and indistinct" nature of this issue, *Ellsworth v. City of Racine, supra*, a much closer analogy should be required to show a clearly-established duty for §1983 purposes.

(b) The Sixth Circuit's ruling also conflicts with this Court's position in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). There, this Court stated:

> (E)lementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a linger-

> ing death," In re Kemmler, supra, the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purposes.

429 U.S. at 103, 97 S.Ct. at 290, 50 L.Ed.2d at 259. Intervention in medical care would seemingly vitiate this right.

It may possibly be that a competent pre-trial detainee has a constitutionally-protected liberty interest in being free of non-consensual medical treatment. *See Cruzan v. Director, Missouri Department of Health*, 497 U.S.____at ____, 110 S.Ct. 2841 at 2851, 111 L.Ed.2d 224 at 241 (1990); *Washington v. Harper*, 494 U.S. 210, 221, 110 S.Ct. 1028,1036, 108 L.Ed.2d 178, 198 (1990); *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). But to say that such a right exists is not to say that it was clearly established under *Anderson* for purposes of §1983 jurisprudence: that in the fact-specific setting of a hospital emergency room, auxiliary medical personnel had a duty to intervene to preserve it. *See Siegurt v. Gilley*, ____U.S.____, 111 S. Ct. 1789, 114 L.Ed.2d 277 (1991).

(c) The granting of certiorari does not turn alone on the specific grounds articulated at Supreme Court Rule 10.1.(a)-(c). The criteria there set out neither control nor fully measure the Supreme Court's discretion, and certiorari may be granted wherever "special and important reasons" for the grant exist. Supreme Court Rule 10.1.

Here, such special and important public policy reasons definitely exist. If, as the court below has ruled, auxiliary medical personnel, such as nurses, are open to individual liability under § 1983 simply by virtue of failure to intervene in ostensibly appropriate medical treatment in a hospital emergency room, which is being conducted by other personnel under a physician's supervision, continuation of such treatment in the public hospital

setting may become highly problematic. This is not analogous to failure to intervene in a police brutality case, where obvious physical violence and injury are inflicted upon a plaintiff. Here, medical procedures were being performed. Expertise is required to evaluate such situations. Unlike police cases, *intervention* in this situation could harm, even kill, the plaintiff.

If a nurse is under a duty to substitute her (or his) judgment for that of the physician and other medical personnel treating a patient — even a patient apparently withholding consent — on peril of §1983 liability, the treatment of such patients may rapidly become unmanageable and the activities of such nurses uninsurable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5708

CONNIE McCOY CLARK,
Plaintiff-Appellee,

v.

BILLIE J. UPCHURCH; CHERYL JORDAN BALL,
Defendants-Appellants.

On Appeal from the United States District
Court for the Middle District of Tennessee

Before: GUY, NORRIS, and BATCHELDER, Circuit Judges.

PER CURIAM. Defendants, two municipal hospital nurses, appeal the denial of their motion for summary judgment, which was premised on a claim of qualified immunity. The nurses were among several defendants whom plaintiff had sued under 28 U.S.C. § 1983 for allegedly violating her Fourth and Fourteenth Amendment rights. Finding that the district court correctly determined that the constitutional rights which plaintiff claims were violated were clearly established at the time of these events and that a jury could find, if they accepted the plaintiff's version of the facts, that defendants violated these rights, we affirm the district court.

I.

The facts pertinent to plaintiff's claims against the nurses are contested, but, in our *de novo* review of the qualified immunity denial, we must accept plaintiff's version of the event[1] *EEOC*

---

[1] Plaintiff's brief, at 35, seems to suggest that these section 1983 defendants may not appeal the district court's refusal to grant them summary judg-

(Footnote 1 continued next page)

v. University of Detroit, 904 F.2d 331, 334 (6th Cir. 1990). Plaintiff, Connie Clark, was involved in an auto accident on October 11, 1989. When a passenger in the other car became abusive, Clark left the scene and returned to her home. Later that evening, a local police officer — also a defendant in this case — entered Clark's apartment without her consent and arrested her, without a warrant, for the misdemeanors of drunk driving and leaving the scene of a non-fatal accident. According to this officer, Clark was "completely incoherent and unresponsive" when he arrested her. (App. at 16).

At the police station, defendant officer procured arrest warrants for Clark. While at the station, Clark agreed to submit to a breath-alcohol test, but when she was unable to blow into the equipment with enough force to produce a reading, the defendant officer took her to the county hospital. It was here that Clark encountered the two defendant nurses in this appeal, Billie J. Upchurch and Cheryl A. Jordan.

Nurse Upchurch's first acts, again according to Clark, included kicking Clark, violently jerking Clark's head, and wiping Clark's face with a rag. Upchurch then measured Clark's pulse and blood pressure despite Clark's refusal to consent to any medical treatment. Then, with defendant officer's help, Upchurch forcibly placed Clark on a gurney with her hands handcuffed behind her, aggravating the pain in Clark's broken collarbone. Clark involuntarily urinated on herself when Upchurch and the officer refused her repeated requests to use the toilet. Another defendant, a laboratory technician, then extracted a blood sample against Clark's express wishes (and without a warrant). It is

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(Footnote 1 Continued)

ment on the issue of qualified immunity. This claim is clearly in error. *Huron Valley Hosp., Inc. v. City of Pontiac,* 792 F.2d 563, 566-67 (6th Cir.), *cert. denied,* 479 U.S. 885 (1986).

unclear from the record whether it was the blood sample or the urine specimen, or both, which revealed that plaintiff had a blood-alcohol content of .213.

Nurse Jordan then entered the room and told Clark she was "stupid" and would get "exactly what she deserved for not telling them what had happened." (App. at 19-20). Jordan asked Clark if she had been catheterized for a drug screen. Clark offered to provide a urine specimen instead, but Jordan attempted to force Clark's leg apart and remove her pants to prepare Clark for catheterization. Clark, in self-defense, kicked Jordan with both legs. Jordan then summoned defendant officer and two defendant security guards. These others handcuffed Clark's right arm to the gurney and held her down, restricting her breathing and exerting additional stress on Clark's injured collarbone. Nurse Upchurch reappeared at this point; both Upchurch and Jordan were thus present during the following events.

The other defendants whom Jordan had summoned succeeded in pushing Clark's legs apart while another defendant nurse removed Clark's undergarments and forcibly catheterized her. Clark continued to scream her objections; defendants Upchurch and Jordan stood by.

When the catheterization was complete, all the defendants present (including Upchurch and Jordan) refused to pull Clark's pants and undergarments back up. They left Clark lying with her buttocks, public area, genitalia, and anus exposed within full view of a hospital corridor. The record does not disclose how long Clark remained in this position. She was rescued only when the defendant police officer went off duty and was relieved by another officer.

Clark's section 1983 claims against the police officer, the county, the nurses, and other defendants alleged various constitutional violations flowing from the warrantless entry into her apartment, her arrest, and the incidents at the hospital. Nurses

Upchurch and Jordan moved to dismiss or, in the alternative, for summary judgment, claiming not only that Clark had failed to state a claim for which section 1983 relief could be granted, but also that they were entitled to qualified immunity. The district judge denied the nurse's motion. We assume in this appeal that the nurses were state actors for section 1983 purposes; we reach only the qualified immunity issue.

II.

"[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted).

Although defendants have attempted to characterize this case as involving only a "duty to intervene," we believe plaintiff has properly alleged a violation of the substantive due process right of pretrial detainees to be free from serious bodily intrusions, the procedural due process right to refuse or challenge unwanted medical treatment, the right to be free from warrantless extractions of bodily fluids conducted in an unreasonable manner, and the "right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary . . . ." *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987).

In a thorough opinion applying qualified immunity principles, the district court ruled that " 'the contours of the rights' involved in this case are sufficiently clear such that reasonable state

officials would understand when their actions violate these rights." *Clark v. Hyde*, No. 3:90-0880, slip op. at 19 (M.D. Tenn. May 21, 1991) (quoting *Anderson*, 483 U.S. at 640).

We agree with the district judge that the rights claimed by plaintiff were clearly established in 1989, although we express no opinion as to whether defendants did indeed violate those rights. We must disagree, however, with the judge's suggestion that the entitlement to qualified immunity is a jury question. "The question of whether qualified immunity attaches to an official's actions is a purely legal question for the trial judge to determine prior to trial." *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). We note that discovery has not yet been completed in this case. Defendants may again move for summary judgment when the facts have been developed further. Although one of the purposes of allowing the appeal of an interlocutory denial of a summary judgment motion asserting qualified immunity is to avoid unnecessary litigation expenses, it is not always possible to serve this goal so early in the litigation process. In cases involving multiple actors and disputed facts, litigation may have to proceed further before the qualified immunity issue may be resolved.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0880

CONNIE MCCOY CLARK,
Plaintiff,

vs.

FLOYD A. HYDE,
METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY,
TERRACE HILL APARTMENTS, IRMA WORDELL,
VICKI GRIGGS, BILLIE J. UPCHURCH, JOE DOE,
CHERYL A. JORDAN, JANE DOE, JAMES DOE and
JONATHAN DOE,
Defendants.

MEMORANDUM

The plaintiff brought this action against numerous defendants pursuant to 42 U.S.C. § 1983, Tennessee common law, the Constitution of the State of Tennessee, and various Tennessee statutes. Clark claims the defendants violated her rights secured by the fourth, fifth, and fourteenth amendments to the United States Constitution following a motor vehicle accident on October 11, 1989. Presently pending before the Court is a motion to dismiss or for summary judgment brought by two defendants, Billie J. Upchurch and Cheryl A. Jordan Ball. For the following reasons, the motion is denied. The Court also denies the plaintiff's motion for sanctions, the motion of defendants Upchurch and Ball to strike paragraphs six and seven of the plaintiff's affidavit of December 27, 1990, and the plaintiff's motion to strike defenses asserted by defendants Terrace Hill Apartments, Irma Wordell, and Vicki Griggs.

I.

Because the parties have submitted matters outside the pleadings for the Court's consideration, the Court will treat the defendants' motion to dismiss for failure to state a claim upon which relief can be granted as one for summary judgment governed by Federal Rule of Civil Procedure 56. *See* Fed. R. Civ. P. 12(b).

Pursuant to Rule 56, summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party satisfies this burden by " 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party satisfies its burden, the party opposing the motion "must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (the court should determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."). Taking the record as a whole and viewing the facts in a light most favorable to the party opposing the motion, summary judgment is appropriate where the party opposing the motion "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

II.

Defendant Upchurch, at the time of the events complained of by plaintiff Clark, was employed by defendant Metropolitan Government as a licensed practical nurse working at Metropolitan General Hospital ("General Hospital"). Defendant Ball was

employed by Metropolitan Government as a registered nurse working at General Hospital. The allegations relating to defendants Upchurch and Ball (referred to in the complaint as Jordan) are as follows:

G. Unconstitutional warrantless seizure of blood from Mrs. Clark:

53) Upon her arrival at General Hospital Mrs. Clark encountered the Defendant Upchurch, who was working as a triage nurse. The Defendant wiped the Plaintiff's face with a rag and violently jerked the Plaintiff's head. The Defendant Upchurch stepped on the Plaintiff's feet and kicked her.

54) Mrs. Clark attempted to resist the battery committed by the Defendant Upchurch. . . .

55) The Defendant Upchurch measured Mrs. Clark's pulse and blood pressure, even though Mrs. Clark had refused consent for any medical treatment. The Defendants Upchurch and Hyde [a Metropolitan police officer] forcibly placed Mrs. Clark on a gurney with her arms handcuffed behind her in such a manner as to exert undue stress upon her broken collar bone.

56) The Defendants Upchurch and Hyde refused Mrs. Clark's repeated requests to be allowed to use the toilet facilities. Mrs. Clark again involuntarily urinated while handcuffed to the gurney.

57) The Defendant John Doe, against the express wishes of Mrs. Clark, took a needle and extracted blood from Mrs. Clark's arm. Neither the Defendant John Doe nor anyone else at any time displayed any warrant for the collection of bodily fluids.

* * *

I. Warrantless forcible catheterization of Mrs. Clark:

63) Following the above-described questioning of Mrs. Clark by the Defendant Hyde, the Defendant Jordan [Ball] came in and told Mrs. Clark that she was stupid and that she was going to get exactly what she deserved for not telling them what had happened.

64) The Defendant Jordan then asked Mrs. Clark if she had been catheterized for a drug screen. Mrs. Clark offered to give a urine specimen; however, the Defendant Jordan attempted to force Mrs. Clark's legs apart and to remove her pants.

65) Mrs. Clark vehemently objected to being catheterized. She raised both feet and kicked the Defendant Jordan across the room.

66) The Defendant Jordan then summoned the Defendants Hyde, James Doe and Jonathan Doe. The Defendants James Doe and Jonathan Doe handcuffed Mrs. Clark's right arm to the gurney and held Mrs. Clark down by her sides, and the Defendant Hyde placed his forearm across her throat, restricting her breathing, and across her injured collar bone.

67) The Defendant Upchurch and the Defendant Jane Doe then entered the room. The Defendants James Doe and Jonathan Doe held Mrs. Clark's legs apart. The Defendant Jane Doe lowered Mrs. Clark's pants and undergarments and forcibly catheterized her while Mrs. Clark screamed her objections.

68) During the time of the forcible catheterization of Mrs. Clark by the Defendant Jane Doe, the Defendants Jordan, Upchurch, Hyde, James Doe and Jonathan Doe were all present. No Defendant took any action to prevent this violation of Mrs. Clark's person.

69) After the catheterization was completed, the Defendants refused to pull Mrs. Clark's pants and undergarments back up. The Defendants instead left her lying with her buttocks, public area, genitalia and anus exposed within full view of a hospital corridor. Mrs. Clark remained in this humiliating condition until the Defendant Hyde went off duty and was relieved by another police officer.

* * *

J. Harm suffered by Mrs. Clark as a result of Defendants' actions:

* * *

75) The Plaintiff avers that the actions and omissions of the Defendants Hyde, Jordan, Upchurch, Jane Doe, James Doe and Jonathan Doe constitute an actionable deprivation of her Fourteenth Amendment liberty interest in the right to refuse medical treatment.

76) The Plaintiff avers that the actions and omissions of the Defendant[s] have violated her right to be free of unreasonable searches and seizures in contravention of rights secured to the Plaintiff by the Fourth and Fourteenth Amendments.

77) The Plaintiff avers that the actions and omissions of the Defendants have deprived her of her Fourteenth Amendment liberty interest in freedom from unduly harsh treatment while in custody as a pretrial detainee.

78) The Plaintiff avers that the conduct of the Defendants set forth hereinabove demonstrates such callous and reckless disregard for he constitutional rights as to make appropriate an award of punitive or exemplary damages.

Complaint at 12-17.

Defendants Upchurch and Ball ("defendants") argue Clark has failed to state a claim under § 1983 upon which relief can be

granted against them and that, therefore, the Court should dismiss the federal claim as well as the pendent state law claims against these two defendants. To state a claim under § 1983 a plaintiff must allege that there has been (1) a violation of rights held under the Constitution and laws of the United States (2) by a person action under color of any state statute, ordinance, regulation, custom, or usage. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40, 48 (1988). The defendants suggest the plaintiff has not met either prong in naming them in the complaint. The Court disagrees.

A. Under Color of Law

Although admitting that public employee generally acts under color of law when acting in his official capacity or exercising his responsibilities pursuant to law,[1] the defendants suggest that the mere allegation that a nurse is employed by a municipally owned and operated hospital does not satisfy the "color of law" requirement of § 1983. The defendants rely on *Place v. Shephard*, 446 F.2d 1239 (6th Cir. 1971), in which the Sixth Circuit affirmed dismissal of a nurse's complaint against the head nurse of a municipally owned hospital, two private hospitals, and a nurses association. The Sixth Circuit reasoned as follows:

> As a municipal hospital employee, [the defendant] arguably was vested with authority by the city to discharge the duties incident to her position. Under this theory, any action taken by her in her official capacity and within her apparent authority would be "under color of law." On the other hand, nothing Mrs. Shepherd allegedly did was done under the guise or pretense of any state law. Except for the fact that she was a city employee nothing about Shepherd's activity, or the effect thereof, was in any way dependent upon or enhanced by, any state power or authority vested in

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[1] *See West v. Atkins*, 487 U.S. at 50.

> her. Her alleged activities could have been done by supervisory personnel of any hospital, public or private, with the same effect.
>
> * * *
>
> We will not hold that *anything* done in the performance of the duties of any employee, supervisory or otherwise, of a hospital becomes action under color of state law merely because the employer is a hospital owned and operated by a municipal corporation. . . .

Id. at 1244-45. *Cf. Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 282 (7th Cir. 1986):

> Although *Place* states that the termination of a registered nurse in a pubic hospital by the head nurse of that hospital is not state action, reasoning that nothing done by the head nurse was dependent upon or enhanced by any state powers . . . such is not the law generally or in this Circuit. . . . The Sixth Circuit assumed that a city official is liable only if her conduct arose out of a "statute, ordinance, regulation, custom or usage of the city," . . .' yet this argument was rejected by the landmark case of *Monroe v. Pape* which held that a person acts "under color of" state law even though his acts were not authorized by the state or indeed were even forbidden by the state. *Monroe v. Pape*, 365 U.S. 167, 172, 187, 81 S. Ct. 473, 476, 484, 5 L.Ed.2d 492. . . .

This Court finds *Place* inapplicable to the present facts. In *Place* the plaintiff complained the defendant head nurse's actions deprived her of her civil rights by impairing her right to free speech and by reducing her employment opportunities. In this case the plaintiff claims the two defendant nurses employed by Nashville Metropolitan Government were involved in forcibly obtaining blood and urine samples from her without her consent, while a Metropolitan police officer was present. To determine

whether a defendant acted under color of state law "it is necessary to scrutinize the nature of the act." *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980). The acts at issue here are distinctly different than those at issue in *Place*.

The traditional definition of acting under color of state law requires that the defendants in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (citation omitted). To constitute state action, "the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*. at 49 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982)). "[S]tate employment is generally sufficient to render the defendant a state actor." *Id.*[2] Moreover, the fact that a state employee's role parallels one in the private sector is not, by itself, reason to conclude that the former is not acting under color of state law in performing his or her duties. *Id.*, 487 U.S. at 56 n. 15. " 'If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity. . . .' " *Id.* (quoting *Griffin v. Maryland*, 378 U.S. 130, 135, 84 S. Ct. 1770, 12 L.Ed.2d 754 (1964)).

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[2] In *West* the Supreme Court commented that *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 70 L.Ed.2d 509 (1981) (holding a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding), "is *the only case* in which this Court has determined that a person who is employed by the State and who is sued under § 1983 for abusing his position in the performance of his assigned tasks was not acting under color of state law." *West*, 487 U.S. at 50 (emphasis added).

Defendants Upchurch and Ball were employees of Metropolitan Government, clothed with the authority to act within the scope of their nursing positions. That they may have exceeded the scope of authority does not rule out the conclusion that they were acting under color of state law in their capacities as municipal employees when they tended to the plaintiff. Moreover, according to the Supreme Court's statements in *West*, that the defendant nurses might have acted identically toward Mrs. Clark had they been employed by a privately owned hospital adds little, if any, weight to their argument that they were not state actors. Therefore, this Court holds that, at a minimum, a genuine issue of fact exists as to whether defendants Upchurch and Ball were acting under color of state law during their encounter with the plaintiff on October 11-12, 1989.

B. Allegations of Constitutional Violations

Despite the above conclusion, summary judgment still would be an appropriate remedy if the record presents no genuine issue of fact as to whether any constitutional right of the plaintiff was violated by defendants Upchurch and Ball. Because the Court is convinced that material issues of fact exist, the defendants' motion must be denied.

1. Substantive Due Process

The fourteenth amendment to the United States Constitution prohibits any state deprivation of life, liberty, or property without due process of law. Concerning the allegations in the complaint most favorably to plaintiff Clark, the complaint asserts that Mrs. Clark was forcibly catheterized in the presence of the two defendants despite her willingness to give a urine specimen and despite her continuous objections, and the defendants left her in a state of nudity for an undisclosed period of time in full view of a hospital corridor. The plaintiff claims this conduct violated her liberty interest in being free from unjustified intrusions on her personal security and bodily integrity. *See*

Ingraham v. Wright, 430 U.S. 651, 673 (1977); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987); *Lewis v. Downs*, 774 F.2d 711, 713 (6th Cir. 1985); *modified on other grounds, Lewis v. City of Irvine*, 899 F.2d 451 (6th Cir. 1990).

The plaintiff relies primarily on *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), in which the Supreme Court reversed the defendant's conviction for possession of morphine because the methods used by the police officers to obtain the convictions violated the due process clause. The defendant had swallowed two capsules containing morphine, despite the efforts of the officers to extract the capsules by force, when the officers illegally entered the defendant's dwelling. The defendant was handcuffed and taken to a hospital, where at the direction of one of the officers, a doctor forced an emetic solution through a tube into the defendant's stomach against his will. The defendant was convicted in the state courts primarily on the evidence of the capsules. The Supreme Court held that the stomach pumping method used by the state actors offended "a sense of justice":

> [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Rochin, 342 U.S. at 172-73.

The plaintiff also relies on a decision of the Tenth Circuit Court of Appeals. In *Yanez v. Romero,* 619 F.2d 851, 855 (10th Cir.), *cert. denied,* 449 U.S. 876 (1980), a federal habeas corpus action, the court in dicta states that "[w]e consider the forceful use of the catheter to obtain a body fluid to be a gross personal indignity." *Id.* at 855. The court, however, refused to apply *Rochin* to find a violation of the petitioner's due process rights:

> It is to be gleaned from the evidence that the practice of either threatening to use a catheter or the actual use of it is not an infrequent occurrence in New Mexico. While this may not be shocking to the extent that it was in the *Rochin* case, it is nevertheless an undesirable practice which is ultimately likely to produce a fact situation which will be ruled shocking and unlawful. We are not, however, justified in reaching this conclusion in the present case because of the fact that the *Rochin* decision pretty much stands by itself and is limited to its particular facts. This is not to say that you would have to have a stomach pump in order to satisfy the requirements, but there would have to be something akin to it plus gross circumstances equal to the forceful entry into the home and bedroom of the defendant and the forceful effort to obtain the evidence.

Id. at 854. The Tenth Circuit did concede that, "[h]ad there been an actual use of the equipment (the catheter) which the officers threatened to use, the problem would be much closer to that which was present in *Rochin.*" *Id.* at 855.

The defendants dispute the plaintiff's reliance on *Rochin* and *Yanez,* arguing that the stomach pumping and threatened catheterization involved in those two cases had no "medical purpose". In contrast, according to defendants, the blood testing and catheterization of Mrs. Clark were done "pursuant to treatment in an emergency room under the supervision of a physician, incident to plaintiff's evaluation and treatment as a victim of a

motor vehicle accident. *See* Affidavit of Walid Arnaout, M.D. . . ." Defendants' Supplemental Memorandum at 2. To support their claim that the blood testing and catheterization of the plaintiff were conducted for medical and not evidentiary purposes, the defendants point out that, although Metropolitan General Hospital has a procedure for obtaining blood and urine specimens for evidentiary purposes (requiring a written request from a Metropolitan police officer and laboratory analysis in a State laboratory rather than in General Hospital laboratories), such procedures were not followed in this case.

The Court is not persuaded by the defendants' medical-evidentiary distinction. Even accepting the defendants' proposition (supported by the affidavit of Walid Arnaout) that the samples were taken incident to customary medical treatment following a motor vehicle accident, the fact remains that the samples have an evidentiary value. Moreover, the Supreme Court has stated that "[t]he medical nature of the inquiry . . . does not justify dispensing with due process requirements." *Vitek v. Jones,* 455 U.S. 480, 495, 100 S.Ct. 1254, 1264, 63 L.Ed.2d 552 (1980). Thus, although blood and urine samples may be necessary elements in the proper emergency treatment of victims of motor vehicle accidents, the *method* of obtaining these samples still remains subject to constitutional scrutiny where the defendants are state actors. Whether defendants Upchurch and Ball violated Mrs. Clark's right to be free from unlawful medical intrusions upon her bodily integrity is a question best left for the jury. *See Webb v. McCullough,* 828 F.2d 1151, 1158-59 (6th Cir. 1987) (holding whether principal violated student's fourteenth amendment rights when he broke through locked bathroom door in her hotel room, knocking her against the wall, involved disputed fact questions, precluding summary judgment).[3]

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[3] *See also Schmerber v. California,* 384 U.S. 757, 760 n. 4 (1966) (although holding that defendant's due process rights had not been violated by physician's

(Footnote 3 continued on next page)

2. Right to Refuse Medical Treatment

The plaintiff's complaint alleges that the acts and omissions of defendants Upchurch and Ball deprived her of her fourteenth amendment liberty interest in the right to refuse medical treatment. The procedural protections required by the due process clause must be determined with reference to the rights and interests at stake in the particular case. *Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178, 203 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."). The Court must consider the private interest at stake in a governmental decision, the governmental interest involved, and the value of procedural requirements in determining what process is due under the fourteenth amendment. *Id.* (citing *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Defendants, citing the Supreme Court's statement in *Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. __, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224, 241 (1990), that "an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment", argue that Mrs. Clark was incompetent to make an informed and voluntary decision regarding her treatment at General Hospital, that consequently she has alleged no constitutional infringement and that, therefore, summary judgment should be entered against her. Defendants refer the Court to medical records revealing the plaintiff's blood alcohol level was .213 when she presented to the

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(Footnote 3 continued)

withdrawal of blood sample despite defendant's refusal to consent, Court noted that "[i]t would be a different case if the police [or other state actor[initiated the violence, *refused to respect a reasonable request to undergo a different form of testing,* or responded to resistance with inappropriate force." (emphasis added).

emergency room, a level more than double the presumptive level of intoxication established by Tennessee law. *See* Tenn. Code Ann. § 55-10-408(b); *see also* Exhibit B to Defendants' Motion at 7 (relevant medical records).

The plaintiff rebuts the defendants' allegations of incapacity to consent with an affidavit which states the following: "While at General Hospital I was fully conscious and aware of my surroundings. I was able to understand the nature of what was happening. I was at all times fully capable of either giving or withholding consent for medical treatment." Affidavit of Connie McCoy Clark (attached to Plaintiff's Response to Defendants' Motion). Thus, although the medical records and the affidavit of Clark's emergency room treating physician may raise an inference that the plaintiff lacked the capacity to consent to medical treatment, the plaintiff's affidavit creates a genuine issue of fact on the question of Clark's capacity to consent to the medical procedures.[4] This factual dispute alone precludes summary judgment on the plaintiff's claim that the defendants violated her procedural due process right to refuse medical treatment. Moreover, on the current record, weighing the plaintiff's liberty interest against relevant state interests, this Court is unable to rule as a mater of law that the complaint fails to state a claim.

3. Unreasonable Search and Seizure

The plaintiff's complaint alleges that the acts and omissions of defendants Upchurch and Ball deprived her of her right, secured by the fourth and fourteenth amendments, to be free from the unreasonable search of her person and seizure of her blood and urine. The plaintiff relies heavily on the Supreme Court decision in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16

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[4] The defendants have filed a motion to strike the two paragraphs of the plaintiff's affidavit which address the plaintiff's capacity to consent or withhold consent to medical treatment. As the Court will discuss fully below, this motion is not meritorious.

L.Ed.2d 908 (1966), in which the Supreme Court affirmed the defendant's conviction for driving an automobile while under the influence of intoxicating liquor despite the fact that, while the defendant was at a hospital receiving treatment for injuries suffered in the accident, a blood sample was withdrawn from the protesting defendant by a physician at the direction of a police officer without a search warrant. The Supreme Court emphasized that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.*, 384 U.S. at 767. The Court held that compulsory blood testing procedures "plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning that Amendment." *Id* at 767. However, based on the facts before it, the Court held that the seizure of the defendant's blood was not unreasonable. In deeming the warrantless search reasonable, the Court found important that the officer had probable cause to conduct the search and that he was confronted with an emergency — the threat of "destruction of evidence" — in that the percentage of alcohol in the blood begins to diminish shortly after drinking stops. *Id.* at 770. The Court also emphasized that the test chosen to measure the defendant's blood-alcohol level was reasonable and that the test was performed in a reasonable manner because "[p]etitioner's blood was taken by a physician in a hospital environment according to accepted medical practices." *Id.* at 771.[5] In closing the Court noted that its holding was limited to the facts presented:

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[5]The plaintiff points out that not all of these factors work in the defendants' favor in this case. The emergency argument is weakened because, prior to the extraction of Mrs. Clark's blood and urine at General Hospital, the plaintiff had been taken downtown to the police station and defendant Hyde had already been before a judicial commissioner and secured arrest warrants. Complaint at ¶¶ 45-50, Exhibits 2-3. According to plaintiff, therefore, "[i]t cannot credibly be argued that there was no time to secure a search warrant for Mrs. Clark's blood and urine." Plaintiff's Response at 17. Moreover, the alleged forcible catheterization of Mrs. Clark is distinguishable from the "reasonable" blood test performed on the defendant in *Schmerber*.

> It bears repeating . . . that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold the Constitution does not forbid the State minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772. The plaintiff argues forcefully that the record before this Court exhibits "more substantial intrusions" under much less stringently limited conditions. *See also Winston v. Lee,* 470 U.S. 753, 767, 105 S.Ct. 1611, 84 L.Ed.2d 662, 673 (1985) (holding compelled surgical procedure to remove bullet from suspect's chest constituted "more substantial intrusion" and was therefore, an unreasonable search under fourth amendment: "when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.' ").

The reasonableness of intrusions beneath the skin "depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." *Winston,* 470 U.S. at 760. Whether the allegedly forcible blood testing and/or catheterization of the plaintiff constitutes a substantial enough intrusion on Mrs. Clark's privacy rights to violate the fourth amendment is a decision for the jury to reach after hearing all the evidence.

The defendants try to distinguish *Schmerber* and *Winston* from this case by arguing that the medical procedures involved in those cases were conducted for evidentiary, rather than medical purposes. The Court finds this argument as unpersuasive in this context as in the above discussion of the plaintiff's substantive due process claim. Plaintiff points out that she was taken to General Hospital in the first place because of her

inability to complete a breath test at the police station. Complaint at ¶ 51; Clark Affidavit. Moreover, the plaintiff's blood and urine seized at General Hospital, even if analyzed primarily for medical purposes, would be admissible in a criminal proceeding under Tennessee law.[6] Finally, the case law does not support the defendants' attempt to limit the scope of the fourth amendment to criminal evidence-gathering. *See, e.g., Camara v. Municipal Court of the City and County of San Francisco,* 387 U.S. 523, 530, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967) ("It is surely anomalous to say that the individual and his private property and fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."); *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (holding fourth amendment not violated by United States Customs Service drug testing requirement for employees seeking transfer or promotion to positions directly involving the interdiction of illegal drugs or requiring the carrying of a firearm); *United States v. Borchardt,* 809 F.2d 1115, 1117 n. 4 (5th Cir. 1987) ("[T]he Supreme Court has, in the fourth amendment context, rejected the distinction suggested by the Government between searches conducted by law enforcement officials and searches conducted by other government employees.").

Finally, the Court rejects the defendants' argument that, because neither the blood sample nor the urinalysis sample was taken by either Upchurch or Ball, the plaintiff's complaint fails to state a sufficient claim of civil rights violations against these

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[6]Tenn. Code Ann. § 55-10-407(a) (1969) provides the following: "Upon the trial of any person charged with a violation of this chapter, the results of any test made of the person so charged shall be admissible in [a] criminal proceeding." When Mrs. Clark encountered the defendants at General Hospital, she was under arrest and had been charged with driving under the influence of an intoxicant.

two defendants.[7] The defendants contend no duty exists for nurses to intervene in what appears to be appropriate medical treatment in a hospital emergency room. The Sixth Circuit has made clear that the duty to intervene to prevent the violation of another person's civil rights exists where the defendant stands in some kind of "special relationship" to the plaintiff. *Tucker v. Callahan,* 867 F.2d 909, 913 (6th Cir. 1989). At a minimum, a genuine issue exists as to whether defendants Upchurch and Ball had a duty to intervene on the plaintiff's behalf and whether, if so, they violated Mrs. Clark's constitutional rights by failing to intervene. *See Crowder v. Lash,* 687 F.2d 996, 1005 (7th Cir. 1982) ("An official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent."); *Smith v. Heath,* 691 F.2d 220, 225 (6th Cir. 1981) ("Even nonsupervisory officers who are present at the scene of a violation of another's civil rights and who fails to stop the violation can be liable under section 1983."); *Bruner v. Dunaway,* 684 F.2d 422, 426 (6th Cir. 1982), *cert. denied sub nom.,* 459 U.S. 1171 (1983) ("[A] law enforcement officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly. . . . Acts of omission are actionable in this context to the same extent as are acts of commission."); *Johnson v. Duffy,* 588 F.2d 740, 743-44 (9th Cir. 1978) ("A person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the

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[7] The defendants raise this point in objecting to each of plaintiff's constitutional claims. Although the Court addresses the argument in this section dealing with the plaintiff's search and seizure claim, the analysis applies to all assertions by defendants of this "defense".

deprivation of which complaint is made.... The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.").

Therefore, the defendants are not entitled to summary judgment on the plaintiff's allegation of an unlawful search of her person and seizure of her blood and urine.

4. Invasion of Privacy

The plaintiff also claims that the defendant's conduct in leaving her handcuffed to a gurney with her pants down within full view of a hospital corridor violated her fourth amendment right to privacy. *See Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987):

> Neither the Supreme Court nor the Sixth Circuit has ever expressly recognized that the fourth amendment 'right to privacy' encompasses the right to shield one's naked body from view by members of the opposite sex. Two of the three circuits that have considered and/or recognized such a right have done so without detailing its constitutional origins. Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the observe would be repugnant to notions of human decency and personal integrity.

See also Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) ("Most people... have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When

not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.").

Although the defendants contend that the expectation of privacy is reduced in a hospital setting, they have not come forward with sufficient evidence to establish that no genuine issue of fact exists as to whether the plaintiff's right to privacy was impermissibly invaded. The reasonableness of the defendants' treatment of Mrs. Clark at General Hospital in the context of the fourth amendment is a question to be decided by the jury with a complete record before it.

C. Qualified Immunity

The defendants suggest summary judgment is appropriate because they are entitled to qualified immunity as a matter of law. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The relevant question is whether reasonable hospital employees in the positions of Upchurch and Ball could have believed the treatment of Mrs. Clark was lawful, in light of clearly established law and the information the state actors possessed. *See Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) (question of immunity focuses on "objective legal reasonableness" of the official's action). If the law is not clearly established at the time of the incident, summary judgment in favor of the defendant official is appropriate. *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410.

Summary judgment is not appropriate in this case. The lengthy discussion above of plaintiff's constitutional claims includes relevant Supreme Court and Court of Appeals decisions which define the parameters of lawful conduct in scenarios

analogous to the present facts. Therefore, the Court is convinced that "the contours of the rights" involved in this case are sufficiently clear such that reasonable state officials would understand when their actions violate these rights. *See Anderson,* 107 S.Ct. at 3039; *Harlow,* 457 U.S. at 819 ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."). Moreover, whether the defendants' conduct was objectively and legally reasonable is an inherently fact-based decision. The jury is entitled to decide whether the defendants failed to comply with the law governing plaintiff's constitutional claims.

III.

The plaintiff has filed a motion for sanctions against defendants Upchurch and Ball and/or their attorney, Stephen Nunn. Pursuant to Fed. R. Civ. P. 11, she asserts that the motion to dismiss or for summary judgment filed by Mr. Nunn on behalf of Upchurch and Ball was not well grounded in fact nor warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Pursuant to Fed. R. Civ. P. 56(e), the plaintiff asserts that the affidavit of Walid Arnaout, M.D., attached by defendants to their motion to dismiss or for summary judgment, was made in bad faith because it was not sworn on personal knowledge and does not set forth the factual basis for many of the conclusions set forth within it.

This is not an appropriate case for sanctions. The Court finds the affidavit of Walid Arnaout was not submitted in bad faith or solely for the purpose of delay. Although the Court finds the defendants' motion to dismiss or for summary judgment unpersuasive, the Court is not convinced that the defendants' counsel failed to meet Rule 11's objective standard of reasonableness in filing the motion. Therefore, the plaintiff's motion for sanctions is denied.

IV.

The defendants Upchurch and Ball have filed a motion to strike paragraphs six and seven of the plaintiff's affidavit of December 27, 1990.[8] The defendants suggest the plaintiff is not qualified to assess her own mental competency, and that, therefore, the two paragraphs of her affidavit should be disallowed under Fed. R. Civ. P. 56(e).[9] The defendants point to Tenn. Code Ann. § 29-26-118, which provides that expert testimony is generally necessary to prove inadequacy of consent in Tennessee medical malpractice cases. The defendants argue the same rule should apply to § 1983 cases where informed consent in connection with medical treatment is an issue.

In opposing the motion to strike, the plaintiff points to Rule 602 of the Federal Rules of Evidence, which provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The plaintiff argues that clearly she possesses personal knowledge as to whether she was conscious, aware of her surroundings, and able to understand the nature of what was happening to her body. Moreover, Federal Rule of

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[8] The paragraphs of the affidavit which the defendants move to be stricken read as follows:

> 6) While at General Hospital I never consented to medical treatment of any kind.
>
> 7) While at General Hospital I was fully conscious and aware of my surroundings. I was able to understand the nature of what was happening. I was at all times fully capable of either giving or withholding consent for medical treatment.

[9] Fed. R. Civ. P. 56(e) requires that affidavits submitted on a summary judgment motion shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Evidence 701 allows a lay witness to testify in the form of an opinion if the "opinions or inferences . . . are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." A critical issue at trial is whether the plaintiff had the capacity to refuse consent to the medical procedures performed on her. Therefore, Mrs. Clark's opinion as to her physical and mental condition is admissible under Rule 701.[10].

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[10] This is not a diversity case governed by *Erie*'s instruction that federal courts sitting in diversity should apply the substantive law of the forum state but apply federal procedural law. Rather, the Court has subject matter jurisdiction because a federal question is presented under 42 U.S.C. § 1983 — whether the defendants have violated the plaintiff's constitutional rights secured by the fourth, fifth, and fourteenth amendments. Consequently, in deciding the defendants' motion to strike the Court has focused on the Federal Rules of Evidence governing the competency of witnesses.

Rule 601 of the Federal Rules of Evidence, however, provides that state law sometimes determines whether a witness is competent to testify:

> **Rule 601. General Rule of Competency**
>
> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to *an element of a claim or defense as to which State law supplies the rule of decision*, the competency of a witness shall be determined in accordance with State law.

Emphasis added. The plaintiff's capacity to consent arguably is an element of her due process claim that her right to refuse medical treatment was violated by defendants. However, in a federal § 1983 action state law does not supply the "rule of decision" on consent. Rather, evidence of the complainant's consent or lack thereof is a factor that the federal finder of fact may weigh in determining whether the complainant's rights have been violated. *See Schmerber*, 384 U.S. at 760 n. 4 ("We 'cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.' . . . It would be a different case if the police . . . refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force.").

(Footnote 10 continued on next page)

Most importantly, the Court is not prepared at this stage in the litigation to strike the plaintiff's affidavit which raises a credibility question best left to the jury:

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. . . . Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.

Fed. R. Evid. 601 advisory committee's note. For the above-states reasons, the defendants' motion to strike is denied.

V.

The final pending motion is one filed by the plaintiff to strike insufficient defenses asserted by defendants Terrace Hill Apartments (Vilet Shores Associates), Irma Wordell, and Vicki Griggs (Jones). Pursuant to Fed. R. Civ. P. 12 (f), the plaintiff argues

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(Footnote 10 continued)

Assuming capacity to consent is governed by Tennessee law, according to Rule 601, Mrs. Clark's competency to testify about her ability to consent or withhold consent also should be determined according to state law. However, even accepting that state law applies, the Court must deny the motion to strike. The defendants' analogy to the Tennessee statute requiring expert testimony on capacity to consent in medical malpractice actions is inapposite. Medical malpractice is a form of negligence, whereas the plaintiff's § 1983 action alleges conduct by the defendants which could constitute intentional torts. Moreover, under Tenn. Code Ann. § 29-26-115(b), expert testimony is not mandatory on the issue of consent if "appropriate witnesses otherwise would not be available." Thus, the fact that Mrs. Clark is not an "expert" on her capacity to withhold consent does not require the Court to strike paragraphs six and seven of her affidavit

eleven defenses asserted by the defendants are clearly invalid as a matter of law. The plaintiff's main contention is that the defendants misconstrue the doctrine of fourth amendment standing by implying that Mrs. Clark had no reasonable expectation of privacy in her person when she was seized by defendants on October 11-12, 1989.

To sustain a motion to strike a defense, the Court must find that the defense is wholly insufficient as a matter of law and so unrelated to the plaintiff's claims as to be unworthy of any consideration. *Dunbar & Gulljuan Dredging Co. v. John R. Jurgensen Co.*, 44 F.R.D. 467, 472 (S.D. Ohio 1967), *aff'd*, 396 F.2d 152 (6th Cir. 1968); *Federal Sav. and Loan Ins. Corp. v. Burdette*, 718 F. Supp. 649, 662 (E.D. Tenn. 1989). The action of striking a pleading should be used sparingly by the courts. *Burdette*, 718 F. Supp. at 662 (Rule 12(f) motions to strike are "generally disfavored".). Because this remedy is drastic, it should be resorted to only when required by justice. *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953). A Rule 12(f) motion is not a forum to resolve disputed issues of fact or the application of law to disputed facts.

The Court does not accept the plaintiff's suggestion that defendants' defenses are "palpably frivolous" and "fantastic". The facts pleaded in defendants' answers to the complaint vary from plaintiff's version of the facts. The defenses at issue in the motion to strike are not "fantastic" when viewed in light of defendants' version of the facts. The challenged defenses are not so overwhelmingly insufficient to be unworthy of submission to the trier of fact for full consideration. Rather, the merits of the defenses must be tested at trial when the record will be complete. Consequently, the Court must deny the plaintiff's motion to strike the defenses.

VI.

For the foregoing reasons, the Court DENIES the motion of defendants Upchurch and Ball to dismiss or for summary judgment. The Court also DENIES the plaintiff's motion for sanctions against defendants Upchurch, Ball, and/or their attorney, Stephen Nunn. The Court DENIES the motion of defendants Upchurch and Ball to strike paragraphs six and seven of the plaintiff's affidavit of December 27, 1990. Finally, the Court DENIES the motion of the plaintiff to strike defenses asserted by defendants Terrace Hill Apartments, Irma Wordell, and Vicki Griggs (Jones). An order in accord shall be entered.

/s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JURY DEMAND

Civil No. 3 90-0880

JUDGE WISEMAN

CONNIE McCOY CLARK,
Plaintiff,

vs.

FLOYD A. HYDE,
METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY,
CHAPMAN'S WRECKER SERVICE,
TERRACE HILL APARTMENTS,
IRMA WORDELL,
VICKI GRIGGS,
BILLIE J. UPCHURCH,
JOHN DOE,
CHERYL A. JORDAN,
JANE DOE,
JAMES DOE and
JONATHAN DOE,
Defendants.

COMPLAINT

Comes now the Plaintiff, Connie McCoy Clark, by and through her attorneys, John E. Herbison and Rebecca Freeman, pursuant to 42 United States Code § 1983, the common law of Tennessee, the Constitution of the State of Tennessee, and various statutes of the State of Tennessee, and sues the Defen-

dants for violation of her rights secured by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and by various provisions of the Constitution of the State of Tennessee and for pendent and/or ancillary causes of action arising under Tennessee law. For cause of action Mrs. Clark would show as follows:

I. PARTIES, JURISDICTION AND VENUE:

1) This Court has jurisdiction of the subject matter in this action as to federal law claims pursuant to 28 United States Code §§ 1331 and 1343(a)(3).

2) This Court has jurisdiction of the subject matter in this action as to claims arising under Tennessee law by operation of the doctrines of pendent jurisdiction and ancillary jurisdiction.

3) The Plaintiff, CONNIE McCOY CLARK, is a resident and citizen of Nashville, Davidson County, Tennessee.

4) The Defendant, FLOYD A. HYDE, is on information and belief, a resident and citizen of Davidson County, Tennessee. He is and at all times relevant to this Complaint has been employed as a police officer by the Metropolitan Government of Nashville and Davidson County.

5) The Defendant, METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, (hereinafter identified as Metropolitan Government) is a consolidated city and county governmental body organized pursuant to Tennessee Code Annotated 7-1-101 *et seq*. Among the administrative departments of government thereof are the Metropolitan Police Department, by which the Defendant Hyde is employed, and the Metropolitan Board of Hospitals, which operates the Metropolitan General Hospital and by which the Defendants Upchurch and Jordan and the Defendants identified herein as John Doe, Jane Doe, James Doe and Jonathan Doe are employed.

6) The Defendant CHAPMAN'S WRECKER SERVICE is a business entity doing business in Davidson County, Tennessee which, on information and belief, provides motor vehicle towing services pursuant to contract with the Defendant Metropolitan Government at the direction of agents or employees of the Metropolitan Police Department. On information and belief this business entity is owned and/or operated by Billy R. Chapman, a resident and citizen of Davidson County, Tennessee.

7) The Defendant TERRACE HILL APARTMENTS is a business entity doing business in Davidson County, Tennessee. This Defendant at the time of the events complained of was the lessor of the Plaintiff's apartment dwelling unit at 1000 Thompson Place, Nashville, Tennessee.

8) The Defendant IRMA WORDELL is, on information and belief, a resident and citizen of Nashville, Davidson County, Tennessee, and at the time of the events complained of was employed as property manager of Terrace Hill Apartments.

9) The Defendant VICKI GRIGGS is on information and belief, a resident and citizen of Davidson County, Tennessee, and at the time of the events complained of was employed as a security guard of Terrace Hill Apartments.

10) The Defendant BILLIE J. UPCHURCH is, on information and belief, a resident and citizen of Davidson County, Tennessee, and at the time of the events complained of was employed by the Defendant Metropolitan Government as a licensed practical nurse working at Metropolitan General Hospital.

11) The Defendant identified here as JOHN DOE is, on information and belief, a resident and citizen of Davidson county, Tennessee, and at the time of the events complained of was employed by the Defendant Metropolitan Government as a laboratory technician working in or around the emergency room

at Metropolitan General Hospital. This Defendant, whose correct name is presently unknown to the Plaintiff, is a young adult white male who on the evening of October 11, 1989 extracted blood from the Plaintiff at Metropolitan General Hospital. The Plaintiff intends to learn the correct name of this Defendant through discovery and at such time will seek to amend this Complaint to reflect such correct name.

12) The Defendant CHERYL A. JORDAN is, on information and belief, a resident and citizen of Davidson County, Tennessee, and at the time of the events complained of was employed by the Defendant Metropolitan Government as a registered nurse at Metropolitan General Hospital. On information and belief, this Defendant is also known as Cheryl Ball.

13) The Defendant identified herein as JANE DOE is, on information and belief, a resident and citizen of Davidson County, Tennessee, and at the time of events complained of was employed by the Defendant Metropolitan Government as a charge nurse working in the emergency room of Metropolitan General Hospital. This Defendant, whose correct name is presently unknown to the Plaintiff, is a mature adult white female who shortly after midnight on the morning of October 12, 1989 forcibly catheterized the Plaintiff at Metropolitan General Hospital. The Plaintiff intends to learn the correct name of this Defendant through discovery and at such time will seek to amend this Complaint to reflect such correct name.

14) The Defendant identified herein as JAMES DOE is, on information and belief, a resident and citizen of Davidson County, Tennessee, and at the time of the events complained of was employed by the Defendant Metropolitan Government as a security guard working in or around the emergency room of Metropolitan General Hospital. This Defendant, whose correct name is presently unknown to the Plaintiff, is a young adult black male who shortly after midnight on the morning of October 12,

1989 restrained the Plaintiff while the Defendant Jane Doe forcibly catheterized the Plaintiff at Metropolitan General Hospital. The Plaintiff intends to learn the correct name of this Defendant through discovery and at such time will seek to amend this Complaint to reflect such correct name.

15) The Defendant identified herein as JONATHAN DOE is, on information and belief, a resident and citizen of Davidson County, Tennessee, and at the time of the events complained of was employed by the Defendant Metropolitan Government as a security guard working in or around the emergency room of Metropolitan General Hospital. This Defendant, whose correct name is presently unknown to the Plaintiff, is a young black male who shortly after midnight on the morning of October 12, 1989 restrained the Plaintiff while the Defendant Jane Doe forcibly catheterized the Plaintiff at Metropolitan General Hospital. The Plaintiff intends to learn the correct name of this Defendant through discovery and at such time will seek to amend this Complaint to reflect such correct name.

16) Venue is proper in this judicial district pursuant to 28 U.S.C. 1391(b), the events complained of having occurred in Nashville, Davidson County, Tennessee.

II. FACTS:

17) On the evening of October 11, 1989, the Plaintiff Mrs. Clark was ill and was staying at her home, an apartment unit at Terrace Hill Apartments at 1000 Thompson Place, Nashville, Tennessee. Mrs. Clark left her home briefly in order to go to a nearby convenience store, where her car was involved in a minor accident with another car.

18) Shortly following this accident Mrs. Clark was assaulted by a woman who had been a passenger in the other car. Fearing for her safety, Mrs. Clark left the premises and returned home.

A. Unreasonable seizure of Mrs. Clark's automobile:

19) On information and belief, the Defendant Hyde at about 7:40 p.m. was summoned to the scene of the accident. On information and belief he arrived there at about 7:45 p.m.

20) On information and belief, the Defendant Hyde caused the Defendant Chapman's Wrecker Service to tow Mrs. Clark's automobile from a parking area outside Mrs. Clark's home shortly before 9:25 p.m. and to deposit the automobile at the Metropolitan Police Department tow-in lot. The Defendant Hyde was without a warrant for the seizure of the Plaintiff's automobile, and no exigent circumstances existed which would excuse the failure to procure a warrant for the seizure thereof.

21) On information and belief, the Defendant Chapman's Wrecker Service acted pursuant to contract with the Defendant Metropolitan Government and at the direction and behest of the Defendant Hyde.

22) On information and belief, the Defendant Chapman's Wrecker Service relied entirely upon the sole discretion of the Defendant Hyde as to whether the automobile should be removed from Mrs. Clark's possession.

23) On information and belief, the Defendant Hyde and/or another employee or agent of the Metropolitan Police Department selected the Defendant Chapman's Wrecker Service to tow the automobile for the benefit of and as an instrumentality of the Defendant Metropolitan Government.

24) On information and belief the Defendant Chapman's Wrecker Service took no action to determine whether the defendant Hyde's direction to remove the vehicle from Mrs. Clark's possession was lawful or unlawful.

25) Plaintiff avers that the actions of the Defendants Hyde and Chapman's Wrecker Service described hereinabove at Para-

graphs 20-24 were undertaken under color of state law and constituted an unreasonable warrantless seizure of Mrs. Clark's property without due process of law.

26) As a result of the unlawful actions of the Defendants Hyde and Chapman's Wrecker Service described hereinabove at Paragraphs 20-24, Mrs. Clark was deprived of the possession and use of her automobile and was forced to expend fifty-three dollars and twenty-five cents ($53.25) in order to recover her automobile.

B. Unconstitutional government policies with regard to vehicle seizures:

27) On information and belief, the Defendant Hyde in directing the unlawful seizure of Mrs. Clark's automobile was acting pursuant to Metropolitan Police Department General Order No. 74-2, as modified by General Order No. 83-2. Such General Orders are issued by the Chief of Police, who is the official with final decision-making authority in this regard, and set forth the policies and procedures of the Defendant Metropolitan Government with regard to police impoundment of motor vehicles.

28) The Plaintiff avers that Metropolitan Police Department General Order No. 74-2, as modified by General Order No. 83-2, is a policy of the Defendant Metropolitan Government within the meaning of 42 U.S.C. 1983. Correct copies of these General Orders are attached hereto as collective Exhibit 1.

29) The Plaintiff avers that Metropolitan Police Department General Order No. 74-2, as modified by General Order No. 83-2, is contrary to the Fourth and Fourteenth Amendments to the United States Constitution, in that such General Orders do not require that a warrant for the seizure of property shall be secured where exigent circumstances are not present, nor do such General orders direct that a warrantless seizure of property is presumptively unreasonable.

30) The Plaintiff avers that the training and supervision of members of the Metropolitan Police Department by the Defendant Metropolitan Government as to the circumstances under which motor vehicles may be impounded reflects deliberate indifference to the Fourth Amendment rights of the Plaintiff and similarly situated citizens.

31) The Plaintiff avers in the alternative that the actions of the Defendant Hyde in causing the impoundment of the Plaintiff's automobile were not in accordance with General order No. 74-2, as modified by General Order No. 83-2, such that the Defendant Hyde's actions amount to negligence *per se* under Tennessee common law.

C. Unconstitutional warrantless entry into Mrs. Clark's home:

32) At some time after 9:00 p.m. on October 11, 1989 the Defendant Hyde made a warrantless entry into Mrs. Clark's apartment.

33) On information and belief, the Defendant Griggs, acting as an agent of and on behalf of the Defendant Terrace Hill Apartments and at the behest of the Defendant Hyde, unlocked the door of Mrs. Clark's apartment by means of a passkey in violation of Tennessee Code Annotated § 66-28-403(d). The Defendants Hyde and Griggs thereupon unlawfully entered Mrs. Clark's apartment without the consent of Mrs. Clark, nor of any person authorized to give consent to enter the apartment.

34) On information and belief, the Defendant Wordell, acting as agent of and on behalf of the Defendant Terrace Hill Apartments, explicitly authorized the unlawful conduct of the Defendant Griggs and thereby facilitated and encouraged the unlawful entry into Mrs. Clark's apartment by the Defendants Hyde and Griggs.

35) Plaintiff avers that the actions of the Defendants Griggs and Wordell, being undertaken at the direction or behest of the Defendant Hyde in his capacity as a police officer, were taken under color of law.

36) At the time of the actions set forth in Paragraphs 32-35 hereinabove, no Defendant had a warrant to search Mrs. Clark's home nor a warrant for the arrest of Mrs. Clark, nor any lawful justification whatever for a nonconsensual entry into Mrs. Clark's home.

D. Unlawful seizure of Mrs. Clark's person:

37) Immediately following his unlawful entry into Mrs. Clark's apartment, the Defendant Hyde effected the warrantless arrest of Mrs. Clark. He informed her that she was under arrest for driving under the influence and for hit and run.

38) Under Tennessee law in force in October 11, 1989, driving under the influence of an intoxicant is a misdemeanor according to T.C.A. §§ 55-10-401 (1986) and 55-10-403(1989); leaving the scene of a non-fatal accident is a misdemeanor according to T.C.A. §§ 55-10-101 (1989) and 55-10-102 (1989).

39) At no time did Mrs. Clark commit any criminal offense in the presence of the Defendant Hyde. On October 11, 1989, the circumstances under which a police officer may lawfully effect a warrantless arrest were set forth in T.C.A. § 40-7-103 (1986). The Plaintiff avers that no such circumstances were present in this case.

40) Plaintiff avers that no circumstances existed which would excuse the failure to secure an arrest warrant prior to the seizure of Mrs. Clark's person.

E. Use of excessive force in effecting arrest of Mrs. Clark:

41) At the time of the events complained of, Mrs. Clark was suffering from a clavicle separation. She informed the Defendant Hyde of this condition when she was being placed under arrest.

42) Notwithstanding Mrs. Clark's protest, the Defendant Hyde employed unreasonable and excessive force in effecting the arrest of Mrs. Clark, specifically including undue force applied to Mrs. Clark's injured collar bone.

43) For the remainder of the time that the Defendant Hyde had Mrs. Clark in custody, he repeatedly applied undue force to her injured collar bone.

44) As a result of the Defendant Hyde's actions, Mrs. Clark unnecessarily suffered severe pain. The Plaintiff avers that the Defendant Hyde in this regard displayed deliberate indifference to the Plaintiff's known physical impairment.

F. Procurement of invalid arrest warrants:

45) After taking Mrs. Clark into custody at her home, the Defendant Hyde caused Mrs. Clark to be transported to the Metropolitan Criminal Justice Center. After their arrival at the Criminal Justice Center, the Defendant Hyde applied for warrants for the arrest of Mrs. Clark before a Night Court Commissioner.

46) At 11:50 p.m. Warrant No. N118932, charging Mrs. Clark, identified therein as Connie McCoy, with driving under the influence, was issued upon the affidavit of complaint submitted by the Defendant Hyde. The statement of the Defendant Hyde which is alleged to constitute probable cause is as follows:

> Subject Ran into The Side of a parked vehicle and left the scene. She was found approximately 15 minutes Later at

> 1000 Thompson Lane and was Completely incoherent and unresponsive. [Capitalization as in original.]

A correct copy of this arrest warrant and affidavit of complaint is attached hereto as Exhibit 2.

47) Plaintiff avers that this affidavit of complaint is so lacking in indicia of probable cause to conclude that Mrs. Clark committed the offense of driving under the influence of an intoxicant that any reasonably well-trained police officer would have known that such affidavit fails to establish probable cause. Specifically, the affidavit does not contain any affirmative allegation that the affiant had personal knowledge of the circumstances, nor does the affidavit contain information providing the basis for the affiant's conclusions. The statement of probable cause in such affidavit fails to state that Mrs. Clark was driving a motor vehicle. The statement of probable cause in such affidavit fails to allege that Mrs. Clark had been drinking or had otherwise consumed any intoxicant. The statement of probable cause in such affidavit fails to allege that Mrs. Clark was at any time in a location where the prohibitions of T.C.A. 55-10-401 are applicable.

48) At 11:55 p.m. Warrant No. N118933, charging Mrs. Clark, identified therein as Connie McCoy, with leaving the scene of an accident, was issued upon the affidavit of complaint submitted by the Defendant Hyde. The statement of the Defendant Hyde which is alleged to constitute probable cause is as follows:

> The Suspect Ran into the side of the wells Vehicle and Left the Scene by first Driving on Murfreesboro Road, Then on Thompson Lane.
>
> She Almost Ran over ms. wells when she was leaving. [Capitalization as in original.]

A correct copy of this arrest warrant and affidavit of complaint is attached hereto as Exhibit 3.

49) Plaintiff avers that this affidavit of complaint is so lacking in indicia of probable cause to conclude that Mrs. Clark committed the offense of leaving the scene of an accident that any reasonably well-trained police officer would have known that such affidavit fails to establish probable cause. Specifically, the affidavit does not contain any affirmative allegation that the affiant had personal knowledge of the circumstances, nor does the affidavit contain information providing the basis for the affiant's conclusions. The statement of probable cause in such affidavit fails to allege that Mrs. Clark was at any time in a location where the prohibitions of T.C.A. 55-10-101 *et seq.* are applicable.

50) On information and belief, the Defendant Hyde made no application for any warrant to support the extraction of any bodily fluids from Mrs. Clark. The Plaintiff avers that, if such intrusive bodily extractions were necessary for any purpose, the Defendant Hyde had ample time and opportunity to secure a warrant therefor.

G. Unconstitutional warrantless seizure of blood from Mrs. Clark:

51) After her arrival at the Metropolitan Criminal Justice Center Mrs. Clark agreed to submit to a breath alcohol test. She was unable to blow into the testing equipment with sufficient force to produce a reading, and a female Police Department employee whose name is unknown to the Plaintiff directed the Defendant Hyde to take the Plaintiff to Metropolitan General Hospital.

52) Before leaving the Criminal Justice Center Mrs. Clark told the Defendant Hyde that she needed to use the toilet facilities. The Defendant Hyde refused this request, and Mrs.

Clark involuntarily urinated on herself while in the patrol car en route to the hospital.

53) Upon her arrival at General Hospital Mrs. Clark encountered the Defendant Upchurch, who was working as a triage nurse. The Defendant wiped the Plaintiff's face with a rag and violently jerked the Plaintiff's head. The Defendant Upchurch stepped on the Plaintiff's feet and kicked her.

54) Mrs. Clark attempted to resist the battery committed by the Defendant Upchurch. The Defendant Hyde thereupon jerked the Plaintiff's injured arm and stepped on her feet.

55) The Defendant Upchurch measured Mrs. Clark's pulse and blood pressure, even though Mrs. Clark had refused consent for any medical treatment. The Defendants Upchurch and Hyde forcibly placed Mrs. Clark on a gurney with her arms handcuffed behind her in such manner as to exert undue stress upon her broken collar bone.

56) The Defendants Upchurch and Hyde refused Mrs. Clark's repeated requests to be allowed to use the toilet facilities. Mrs. Clark again involuntarily urinated while handcuffed to the gurney.

57) The Defendant John Doe, against the express wishes of Mrs. Clark, took a needle and extracted blood from Mrs. Clark's arm. Neither the defendant John Doe nor anyone else at any time displayed any warrant for the collection of bodily fluids.

58) The Defendant Hyde was present and fully cognizant of the warrantless extraction of blood. He did nothing to prevent this flagrant violation of Mrs. Clark's Fourth Amendment rights.

59) At all times complained of, the Defendant Hyde was armed with a deadly weapon, to wit: a handgun. The conduct described at Paragraphs 57-58 therefore amounts to an aggravated assault in violation of T.C.A. § 39-2-101(b) [repeated

November 1, 1989], the Defendant John Doe and the Defendant Hyde each aiding and abetting the other.

H. Unlawful, coercive custodial interrogation of Mrs. Clark:

60) Upon the arrest of Mrs. Clark in her home, the Defendant Hyde refused to give proper warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). Instead, the Defendant Hyde stated, "You have the right to remain silent — I'm sure you know the routine."

61) Following the unlawful extraction of Mrs. Clark's blood described hereinabove at Paragraphs 57-58, the Defendant Hyde told Mrs. Clark that they had three (3) warrants for her and that she was going to jail. The Defendant Hyde told Mrs. Clark that if she would tell him what had happened she would be out in a couple of hours, but if she did not tell him, he would "Jane Doe" her and she would be sent to a mental hospital for at least thirty (30) days.

62) Mrs. Clark told the Defendant Hyde that she wanted to speak with a lawyer. The Defendant Hyde ignored her request.

I. Warrantless forcible catheterization of Mrs. Clark:

63) Following the above-described questioning of Mrs. Clark by the Defendant Hyde, the Defendant Jordan came in and told Mrs. Clark that she was stupid and that she was going to get exactly what she deserved for not telling them what had happened.

64) The Defendant Jordan then asked Mrs. Clark if she had been catheterized for a drug screen. Mrs. Clark offered to give a urine specimen; however, the Defendant Jordan attempted to force Mrs. Clark's legs apart and to remove her pants.

65) Mrs. Clark vehemently objected to being catheterized. She raised both feet and kicked the Defendant Jordan across the room.

66) The Defendant Jordan then summoned the Defendants Hyde, James Doe and Jonathan Doe. The Defendants James Doe and Jonathan Doe handcuffed Mrs. Clark's right arm to the gurney and held Mrs. Clark down by her sides, and the Defendant Hyde placed his forearm across her throat, restricting her breathing, and across her injured collar bone.

67) The Defendant Upchurch and the Defendant Jane Doe then entered the room. The Defendants James Doe and Jonathan Doe held Mrs. Clark's legs apart. The Defendant Jane Doe lowered Mrs. Clark's pants and undergarments and forcibly catheterized her while Mrs. Clark screamed her objections.

68) During the time of the forcible catheterization of Mrs. Clark by the Defendant Jane doe, the Defendants Jordan, Upchurch, Hyde, James Doe and Jonathan Doe were all present. No Defendant took any action to prevent this violation of Mrs. Clark's person.

69) After the catheterization was completed, the Defendants refused to pull Mrs. Clark's pants and undergarments back up. The Defendants instead left her lying with her buttocks, pubic area, genitalia and anus exposed within full view of a hospital corridor. Mrs. Clark remained in this humiliating condition until the Defendant Hyde went off duty and was relieved by another police officer.

70) At all times complained of, the Defendant Hyde was armed with a deadly weapon, to wit: a handgun. The conduct described in Paragraphs 63-68 therefore amounts to an aggravated assault in violation of T.C.A. § 39-2-101(b) [repealed November 1, 1989], the Defendants Hyde, Jordan, Upchurch, Jane Doe, James Doe and Jonathan Doe each aiding and abetting the others.

J. Harm suffered by Mrs. Clark as a result of Defendant's actions:

71) As a direct and proximate result of the Defendants' actions and omissions set forth particularly hereinabove, Mrs. Clark has suffered severe physical pain and grievous mental and emotional distress.

72) As a direct and proximate result of the Defendants' actions and omissions set forth particularly hereinabove, Mrs. Clark has suffered extreme anxiety, sleeplessness, nightmares involving the Defendant Hyde, irritability and nervousness.

73) As a direct and proximate result of her unlawful arrest, Mrs. Clark has had to post a bail bond and to pay a nonrefundable premium to a bail bonding company.

74) As a direct and proximate result of her unlawful arrest, Mrs. Clark has had to retain the services of legal counsel and pay professional fees therefor.

75) The Plaintiff avers that the actions and omissions of the Defendants Hyde, Jordan, Upchurch, Jane Doe, James Doe and Jonathan Doe constitute an actionable deprivation of her Fourteenth Amendment liberty interest in the right to refuse medical treatment.

76) The Plaintiff avers that the actions and omissions of the Defendant have violated her right to be free of unreasonable searches and seizures in contravention of rights secured to the Plaintiff by the Fourth and Fourteenth Amendments.

77) The Plaintiff avers that the actions and omissions of the Defendants amount to an actionable deprivation-of liberty in violation of the substantive due process guaranties of the Fifth and Fourteenth Amendment.

78) The Plaintiff avers that the actions and omissions of the Defendants have deprived her of her Fourteenth Amendment

liberty interest in freedom from unduly harsh treatment while in custody as a pretrial detainee.

79) The Plaintiff avers that the conduct of the Defendants set forth hereinabove demonstrates such callous and reckless disregard for her constitutional rights as to make appropriate an award of punitive or exemplary damages.

K. State law causes of action:

80) The Plaintiff avers that the Defendants Hyde, Jane Doe, Jordan, Upchurch, James Doe and Jonathan Doe are guilty of negligence *per se* under Tennessee common law for committing one or more of the following crimes against Mrs. Clark, in violation of one or more statutes which were then in force, to wit: aggravated assault in violation of T.C.A. § 39-2-101 [repealed November 1, 1989.] The Defendant Hyde, aided and abetted by the Defendants Griggs and Wordell, further violated the statutory restrictions on warrantless arrests of T.C.A. § 40-7-103 (1986). The Defendants Griggs and Wordell are guilty of negligence *per se* for their violation of T.C.A. §§ 66-28-403(d).

81) The Plaintiff avers that there is necessarily implied in the constitution of the State of Tennessee a private right of action for damages against persons acting under color of Tennessee law who deny or abridge a citizen's State Constitutional rights, corresponding to the private right of action against persons acting under color of federal based upon the United States Constitution and recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971).

82) The Plaintiff avers that the conduct of the Defendants described hereinabove has denied rights secured to her by Article I, §§ 7, 8 and 13 and Article XI, § 16 of the Constitution of the State of Tennessee.

83) The Plaintiff avers that the conduct of some or all Defendants set forth hereinabove is so outrageous in character, and so extreme in degree, as to be beyond the pale of decency, and to be regarded as atrocious and utterly intolerable in civilized society.

84) The Plaintiff avers that the actions and omissions of the Defendants Hyde, Jordan, Upchurch, Jane Doe, James Doe and Jonathan Doe constitute an actionable invasion of her privacy.

85) The Plaintiff avers that the actions and omissions of the Defendants Hyde, Jordan, Upchurch, Jane Doe, James Doe and Jonathan Doe constitute an actionable battery.

86) The Plaintiff avers that the actions and omissions of the Defendants Hyde, Jordan, Upchurch, Jane Doe, James Doe and Jonathan Doe constitute an actionable interference with her right to refuse medical treatment.

87) The Plaintiff avers that the actions and omissions of the Defendants evince such willful, wanton, malicious and oppressive conduct as to make appropriate an award of punitive or exemplary damages.

III. DEMAND FOR RELIEF:

THE FOREGOING PREMISES CONSIDERED, THE PLAINTIFF CONNIE McCOY CLARK DEMANDS:

A) That process issue and the Defendants be compelled to appear and answer the averments of this Complaint;

B) That she have judgment jointly and severally against all Defendants;

C) That she be awarded compensatory and punitive damages against the Defendants in the amount of seven hundred fifty thousand dollars ($750,000);

D) That the policies and procedures of the Metropolitan Government with regard to impoundment of motor vehicles violate the Fourth and Fourteenth Amendments to the United States Constitution.

E) That the costs of this action be taxed against the Defendants, including but not limited to reasonable attorneys' fees pursuant to 42 U.S.C. § 1988;

F) That she have such further or general relief as she may be entitled;

G) That this cause be tried by a jury of twelve (12) persons as to all issues of facts.

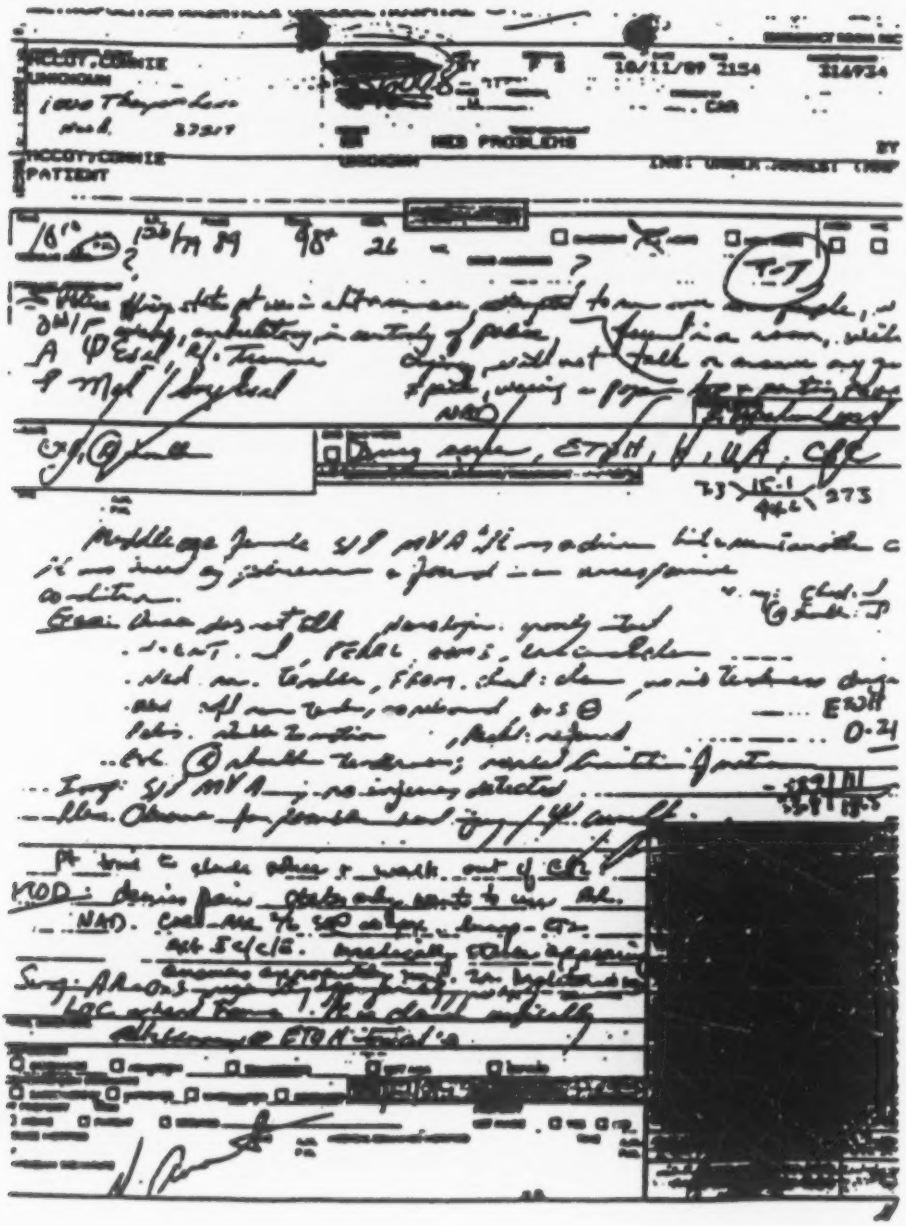
Respectfully submitted,

/s/ JOHN E. HERBISON

/s/ REBECCA FREEMAN

Attorneys for Plaintiff
1205 Eighth Avenue South
Nashville, Tennessee 37203
(615) 242-4200

APPENDIX D



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APPENDIX E

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:90-0880

JUDGE WISEMAN

JURY DEMANDED

CONNIE McCOY CLARK,
Plaintiff,

VS.

FLOYD A. HYDE,
METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY,
CHAPMAN'S WRECKER SERVICE,
TERRACE HILL APARTMENTS, IRMA WORDELL,
VICKI GRIGGS, BILLY J. UPCHURCH, JOE DOE,
CHERYL A. JORDAN, JANE DOE, JAMES DOE
and JONATHAN DOE,
Defendants.

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT OF WALLID ARNAOUT, M.D.

Wallid Arnaout, M.D. being first duly sworn, deposes and says:

I am in the second year of a residency in general surgery at Vanderbilt University Medical Center. I obtained my M.D. from American University of Beirut in 1985.

On the evening and early morning of October 11-12, 1989, I was on duty in the Emergency Room at Metropolitan Nashville General Hospital where I examined and treated the plaintiff in this action, Connie McCoy Clark.

Ms. Clark was brought to the Emergency Room in the custody of Metropolitan police officers who stated that the patient was in a hit and run motor vehicle accident.

At the time of her presentation, the patient was combative and noncooperative; had alcohol odor on her breath; and informed consent could not be obtained from her in her state.

Plaintiff's work-up was non-revealing except for alcohol intoxication, and she was discharged in police custody with that final diagnosis. However, at the time of her admission, the work-up was done to rule out injuries from the motor vehicle accident, including a possible closed head injury. She was found to have no apparent neurologic deficit. A number of medical procedures were performed, including a urinalysis, blood tests and x-rays to rule out possible injuries as a result of the motor vehicle accident.

Further Affiant saith not.

/s/ WALLID ARNAOUT, M.D.

Sworn to and subscribed before me
this 14 day of December, 1990.

/s/ illegible
NOTARY PUBLIC

My Commission Expires: 1-23-93